S232607

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

HECTOR ALVARADO, Plaintiff, Appellant, and Petitioner v. DART CONTAINER CORPORATION OF CALIFORNIA, Defendant and Respondent.	Appellate Case No. E-061645 Justice Codrington, concurrence by Justice Hollenhorst and Justice King Civil Case No. RIC 1211707 Judge Ottolia, Superior Court of California, County of Riverside

On Discretionary Review From The Court of Appeal In And For The Fourth Appellate District, Division Two

RESPONDENT'S ANSWER TO PETITIONER'S PETITION FOR REVIEW

(Service on the Attorney General and District Attorney pursuant to Business and Professions Code sections 17209 and 17536.5)

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I.

INTRODUCTION

The Petition for Review of Petitioner Hector Alvarado ("Alvarado") is based on entirely new legal theories and issues that he never previously asserted in this case – his fourth to date in this matter – and respectfully, should be denied. While Alvarado is certainly allowed to argue his claims in as many judicial forums as he sees fit, he is not entitled to assert entirely new and previously un-litigated theories and issues on appeal, and certainly not in a Petition for Review to this Court.

The sole issue in this case is and has always been whether Respondent Dart Container Corporation of California ("Dart"), Alvarado's previous employer, lawfully calculated overtime for employees who received an attendance bonus and were paid that bonus in the same pay period in which it was earned. There is no California law governing the overtime formula to be used when an employee is paid a bonus in the same pay period in which the bonus is earned. In the absence of controlling California law, Dart followed the only other law on point: federal law. Based on a joint statement of undisputed facts prepared by the parties, the Trial Court first granted Dart's motion for summary judgment and entered judgment in favor of Dart, and Court of Appeal subsequently affirmed the judgment.

Having lost before the two lower courts, Alvarado now petitions this Court for review based on four new issues which were never addressed below, and a new factual assertion which is not only incorrect, but is directly contrary to the stipulated facts upon which the case has been litigated. There is no justification for Alvarado's attempt to litigate before this Court based on new theories and a factual assertion which is directly contrary to facts upon which the parties stipulated, and as a policy matter, this Court normally refuses to consider an issue that a petitioner failed to

timely raise in the Court of Appeal.

The four new issues Alvarado raises in his Petition and his new factual assertion of fact (that the attendance bonus is a salary instead of a bonus) should be disregarded in favor of the controlling issue and relevant facts identified by the Court of Appeal. From the time that Alvarado filed his underlying Complaint through the Court of Appeal's decision, there has been only one issue here: whether Dart's formula for calculating overtime is lawful. The facts were undisputed, as evidenced by the parties joint filing of a statement of undisputed facts with the Trial Court, and remained undisputed until oral argument before the Court of Appeal, when Alvarado, armed with a tentative opinion which was not in his favor, attempted to revise a basic underlying fact which he previously embraced. Alvarado's after-the-fact effort to "re-write" the basic underlying facts such that it is completely opposite to what was previously agreed so that he can support different arguments, is unfair and prejudicial, since Dart never had an opportunity to previously respond to such positions.

Aside from the above, the Petition should fail because it is based on the premise that there is a conflict of law that this Court must resolve. Such premise, however, is fundamentally incorrect. There is no California case, decision, statute or regulation governing bonus overtime. Thus, there is no conflict of law, nor can there be a conflict of law, simply because there is no California law on point.

Dart therefore respectfully requests that the Court deny Alvarado's Petition.

II.

STATEMENT OF THE CASE

A. Statement of Facts

Until oral argument at the Court of Appeal (and still in the opinion of Dart based on the parties' stipulated facts), the facts had never been in dispute. The following summary of facts is derived from the Court of Appeal Opinion, unless otherwise stated, which relied on the parties' joint statement of undisputed material facts. (Court of Appeal Opinion ("Opinion"), p. 2; see also AA[1], p. 068-072.)

Dart is a producer of foam food service products, including cups and plates. (Opinion, p. 2.) Alvarado began working for Dart on September 14, 2010 as a Warehouse Associate and was terminated on January 19, 2012. (*Id.*)

According to Dart's written policy, an attendance bonus ("Attendance Bonus") will be paid to any employee who is scheduled to work a weekend shift and completes that full shift. (*Id.*)[2] The bonus is $15.00 per day ($15 per Saturday and $15 per Sunday) regardless of the number of the hours the employee might work above the normal scheduled length of a shift. (*Id.*) The maximum total for a two day attendance bonus is $30.00. (AA, p. 069, ¶ 3.)

Dart calculates the amount of overtime owed to its employees in a particular pay period using the following four steps. (Opinion, p. 2.)

First, Dart multiplies the number of overtime hours worked in a pay period by the straight hourly rate ("First Step"). (*Id.*)

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[1] All citations to "AA" refer to Appellant's Appendix.

[2] Contrary to Alvarado's Petition, the stipulated facts established that employees do not earn an attendance bonus merely by working a weekend shift; they must be scheduled to work that weekend shift to be eligible for the bonus. (AA, p. 069, ¶ 3a.)

Second, Dart adds the total amount owed in a pay period for regular non-overtime work, extra pay like Attendance Bonuses and the overtime due from the First Step, and then divides that sum by the total number of hours worked in the pay period. The result is the employee's Regular Rate ("Second Step"). (Opinion, p. 3.)

Third, Dart multiplies the number of overtime hours worked in a pay period by the employee's Regular Rate determined in the Second Step and then multiplies that amount by .5 to arrive at the "overtime premium" ("Third Step"). (*Id.*)

Fourth, Dart adds the amount from the First Step to the Third Step. The result is the total amount of overtime owed in a pay period to an employee who earned an Attendance Bonus and worked overtime during that pay period ("Fourth Step"). (*Id.*)

As an example, an employee who works 44 hours in a week (40 regular hours and 4 overtime hours) at an hourly rate of $12 an hour and receives a $30 attendance bonus would have his pay calculated as follows:

1) 4 overtime hours x $12/hour regular hourly pay (overtime pay) = $48
2) 40 regular hours x $12/hour regular hourly pay ($480) + $30 attendance bonus ($510) + $48 overtime pay = $558 / 44 total hours = a Regular Rate of $12.68
3) 4 overtime hours x $12.68 = $50.72 x .5 = $25.36 (the overtime premium)
4) $48 (overtime pay) + $25.36 (overtime premium) + $480 (regular hourly pay) + $30 (attendance bonus) = $583.36 (the total amount due the employee).

Using the same base numbers in terms of hours worked and straight pay rate, Alvarado's proposed formula not surprisingly yields a slightly different and higher result. It also requires four steps and would be

calculated as follows:

1) Determine the regular pay – 40 hours x $12/hour = $480
2) Determine overtime owed – 4 hours x $12/hour x 1.5 = $72
3) Determine overtime on the bonus – $30 (bonus) / 40 hours (regular hours, as opposed to all hours, including overtime hours) = .75 x 4 (overtime hours) x 1.5 (the 1.5 multiplier, rather than the .5 multiplier) = $4
4) Determine total remuneration - $480 + $30 + $72 + $4 = $586. (See Opinion, p. 5.)

Though Alvarado's formula proceeds in four steps that are different than Dart's formula, the $2.64 difference is all accounted for in Alvarado's third step. If Alvarado's formula divided the bonus by the total hours worked, including overtime hours, as federal law requires, and then used a .5 multiplier, as federal law requires, the result in step 3 would be: 30/44 = .68 x 4 = 2.72 x .5 = $1.36, and the total due the employee would be $583.36, the exact same amount that is due under Dart's formula. Therefore, the only issue is whether Dart formula for calculating overtime on these flat sum bonuses paid in the same pay period in which they are owed is lawful.

B. Procedural History

1. The Trial Court Granted Dart's Motion For Summary Judgment

Alvarado filed his Complaint on August 2, 2012, in the Riverside Superior Court, alleging Dart had not properly calculated bonus overtime under California law. (Opinion, p. 3.) Alvarado's complaint, as amended, alleges the following wage and hour causes of action against Dart: (1)

failure to pay proper overtime in violation of Labor Code sections 510 and 1194; (2) failure to provide complete and accurate wage statements in violation of Labor Code section 226; (3) failure to timely pay all earned wages due at separation of employment in violation of Labor Code section 201, 202 and 203; (4) unfair business practices in violation of Business and Professions Code section 17200, *et seq*; and (5) civil penalties pursuant to Labor Code section 2698, *et seq.*, i.e., the Private Attorneys' General Act. (Opinion, p. 3-4.) (AA, p. 001-018.) Each cause of action was predicated on the formula Dart used to calculate overtime during pay periods in which an attendance bonus was earned. (AA, p. 001-018, see specifically AA, p. 004-006, ¶¶ 14-23.)

On January 9, 2014, Dart filed a Motion for Summary Judgment or, Alternatively, Summary Adjudication as to all causes of action in Alvarado's First Amended Complaint (hereafter "Motion"). (AA, p. 049-067.) As the facts were not in dispute, the parties together drafted a Joint Statement of Undisputed Material Facts and Dart filed it concurrently with the Motion. (AA, p. 068-072.) Both parties relied on these undisputed facts in arguing Dart's Motion. (See AA, p. 049-067, 098-112, 128-142.)

The Trial Court granted summary judgment on Alvarado's First Amended Complaint in its entirety. (AA, p. 143.) The Trial Court found:

- There is no California law applicable to the calculation of overtime pay owed when an employee is paid a bonus in the same pay period in which it is earned;
- *Marin v. Costco Wholesale Corporation* (2008) 169 Cal.App.4th 804, upon which Alvarado almost exclusively relied to oppose Dart's Motion, is inapplicable because it concerned a deferred production bonus whereas Dart's bonus was neither deferred nor was it a production bonus, and the portions of the decision upon which Alvarado relied were dicta;

- Sections 49.2.4.2 and 49.2.4.3 of the Division of Labor Standards Enforcement ("DLSE") Enforcement Policies and Interpretations Manual regarding flat sum bonuses, upon which Alvarado also relied, do not have the force of law and are void regulations because they have not been promulgated in compliance with the Administrative Procedures Act;
- In the absence of controlling California law, federal law must be followed, and the Code of Federal Regulation's formula for calculating overtime owed when an employee is paid a bonus in the same pay period in which it is earned is identical to the formula used by Dart (see 29 C.F.R., §778.209(a); 778.110); and
- As Dart's formula is lawful, all causes of action in Alvarado's First Amended Complaint fail. (AA, p. 154-158; see also Opinion, p. 5.)

The trial court formally entered judgment in favor of Dart and against Alvarado on May 23, 2014. (AA, p. 150-153.) Alvarado then filed a Notice of Appeal on July 31, 2014. (AA, p. 165-167.)

2. The Court of Appeal Affirmed The Trial Court's Summary Judgment Ruling

After the matter was fully briefed, on October 14, 2015 the Court of Appeal issued its tentative ruling, finding in favor of Dart, explaining that "[t]here is no California law specifying a method for computing overtime on flat sum bonuses, and defendant's formula complies with federal law, which provides a formula for calculating bonus overtime." (Court of Appeal Tentative Ruling, p. 2.)

On December 23, 2015, before oral argument, Alvarado associated in new counsel. (Notice of Association, p. 1-2.)

The Court of Appeal heard oral argument on January 6, 2016. During oral argument, Alvarado argued facts that he had never previously mentioned and were different from those to which he had stipulated, and relied on authorities and legal theories that he not previously included in any briefs filed in the Trial Court or Court of Appeal.

The Court of Appeal issued its final Opinion on January 14, 2016. The Court of Appeal's Opinion affirmed the judgment in favor of Dart. As to the new facts, authorities and theories Alvarado cited at oral argument, they were squarely rejected. Addressing the new material in a footnotes, the Court of Appeal explained that the new legal theories Alvarado raised at oral argument were rejected on the basis that they were untimely and had been waived. (Opinion, p. 25-26, n.3.)

Alvarado never filed a Petition for Rehearing with the Court of Appeal.

III.

ARGUMENT

A. Alvarado Failed To Timely Raise The Issues He Now Presents To The Court In His Petition In The Court Of Appeal

Each time Alvarado has been unsuccessful in this litigation, he has altered his legal arguments in an apparent search for some authority to support his *policy* goals. By continuously testing different legal theories, Alvarado is effectively conceding that there is no California law upon which his proposed overtime formula is based. The instant Petition for Review is no different. The Petition once again abandons prior arguments and pieces together new issues and new authorities to create yet another moving target of a legal argument. Alvarado, however, is not entitled to yet another bite at the judicial apple. His failure to timely raise the issues upon which this Petition is based with the Court of Appeal warrants the denial of

his Petition pursuant to California Rules of Court, Rule 8.500(c)(1).

This litigation effectively began when Dart filed a Motion for Summary Judgment with the Trial Court, arguing that because there was no California law specifying a formula for calculating overtime owed when an employee is paid a bonus in the same pay period in which it is earned, Dart correctly followed federal law. Because the facts were not in dispute, the parties drafted a Joint Statement of Undisputed Material Facts upon which both parties relied.

With the undisputed facts as the backdrop, Alvarado based his entire Opposition to Dart's Motion for Summary Judgment on the case of *Marin v. Costco Wholesale Corporation* (2008) 169 Cal.App.4th 804 with a tangential reference to *Skyline Homes, Inc. v. Department of Industrial Relations* (1985) 165 Cal.App.3d 239. (AA, p. 098-112.) Alvarado argued that *Marin* was the controlling California law in this case: "[*Marin*] is precisely on point and deals with the exact same issue in this case: bonuses and calculation of Regular Rate of Pay!" (AA, p. 105:9-11.) Alvarado argued (incorrectly) that the *Marin* court adopted the DLSE Enforcement Manual's two categories of bonuses, production bonuses and flat sum bonuses, and that Dart's bonus was a flat sum bonus. (AA, p.106:16-108, 4.) He concluded by urging the Trial Court to adopt the DLSE Enforcement Manual's provisions regarding flat sum bonuses and apply the DLSE's flat sum bonus formula to this case. (AA, p. 109:24-110:24.)

The Trial Court rejected Alvarado's arguments, granted Dart's Motion for Summary Judgment and entered judgment in favor of Dart. Alvarado responded by filing an appeal that radically changed course. Specifically, in his Opening Brief before the Court of Appeal, Alvarado abandoned *Marin*, arguing that *Skyline*, supported by a 1991 DLSE Opinion Letter, is controlling California law governing the formula that must be used when calculating overtime on flat sum bonuses. (Alvarado's Opening

Appellate Brief ("Opening Brief"), p. 10-12, 20-21.) Although Alvarado's legal authorities and argument changed, his Opening Brief was still based on the undisputed facts upon which the parties agreed in the proceedings below. (Opening Brief, p. 4-9.) After Dart filed its brief, Alvarado filed his Reply Brief, again reasserting *Skyline* in support of his flat sum bonus formula and again agreeing that the issue presented is whether Dart used the appropriate formula for calculating overtime on the flat sum bonus. (Alvarado's Reply Brief, p. 7-16.)

After the Court of Appeal issued its tentative opinion on October 14, 2015, Petitioner associated in new counsel, Dennis F. Moss, on December 23, 2015. (Association of New Counsel, p. 1-2.) Mr. Moss presented oral argument on behalf of Alvarado in lieu of original counsel, Lavi & Ebrahimian. That oral argument was not based on the briefs filed or positions previously taken by Alvarado, but rather consisted entirely of arguments that had never been made before the Trial Court or in Alvarado's appellate briefs. The most surprising about-face was Alvarado's new contention that the attendance bonus was not a bonus but rather a salary, which flew in the face of all of Alvarado's previously filings and was in direct contradiction of Alvarado's concession and long-standing agreement that the attendance bonus is, in fact, a bonus.

In its decision in favor of Dart, the Court of Appeal confirmed that there was only one issue before the Court: "This appeal raises the sole question of law of whether defendant's formula for calculating overtime on flat sum bonuses paid in the same pay period in which they are earned is lawful." (Opinion, p. 2.) The Court answered the issue in the affirmative, finding in favor of Dart because there is no California law specifying a method for computing overtime on a flat sum bonus and Dart's formula complied with federal law. (*Id.*)

The Court of Appeal noted the impropriety of Alvarado's new and

untimely arguments, stating in its Opinion:

> During oral argument plaintiff untimely raised new legal theories not previously briefed by plaintiff and authority not included in plaintiff's appellate briefs. Plaintiff argued for the first time the flat sum bonus was not actually a bonus but rather a salary, and the flat sum bonus was artificially labeled a bonus, constituting a subterfuge that operates to evade overtime pay laws by reducing the regular hourly rate when overtime hours are worked on the weekend. The legal authority, raised for the first time during oral argument, included *Huntington Memorial Hospital v. Superior Court* (2005) 131 Cal.App.4th 893; *Walling v. Youngerman-Reynolds Hardwood Co.* (1945) 325 U.S. 419, 424-425; 29 CFR § 778.203 (premium pay for work on Saturdays, Sundays and other "special days"); 29 CFR § 778.327(b) (temporary or sporadic reduction in schedule); and 29 CFR § 778.502 (artificially labeling part of the regular wages a "bonus.")
>
> We do not address in this decision such untimely, waived theories and legal authority on the grounds plaintiff did not include them in its appellate opening brief or reply; plaintiff did not provide defendant or this court with notice before oral argument of plaintiff's intent to rely on new legal authority and raise new theories; and defendant therefore did not have an opportunity to review and provide a fully informed response to such new theories and legal authorities.
>
> Furthermore, without suggesting whether plaintiff's new theories and legal authority have merit, we decline to consider them because plaintiff has not demonstrated good cause for raising them for the first time during appellate oral argument. (See *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.*

(2000) 78 Cal.App.4th 847, 894, fn. 10 [points raised in appellate reply brief for the first time will not be considered, unless good reason is shown for failure to present them before]; *Acquire II, Ltd. v. Colton Real Estate Group* (2013) 213 Cal.App.4th 959, 977, fn. 12; *Estate of McDaniel* (2008) 161 Cal.App.4th 458, 463, quoting *People v. Harris* (1992) 10 Cal.App.4th 672, 686 [""contentions raised for the first time at oral argument are disfavored *and* may be rejected solely on the ground of their untimeliness.'"].

In filing this Petition for Review, Alvarado is seeking a *fourth* bite at the judicial apple, raising the untimely legal theories and authorities presented at oral argument as well as a new, fourth set of legal theories. Pursuant to California Rule of Court, Rule 8.500(c)(1), which provides that "[a]s a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal," Dart respectfully submits that Alvarado's Petition must be denied because Alvarado failed to raise the issues he now asks this Court to decide.

The new legal and factual issues Alvarado raises in his Petition for Review include the following:

- Whether the attendance bonus is not a bonus but rather a "fixed salary component." (See, e.g., Petition, p. 2.)
- The effect of a 1957 Attorney General Opinion rejecting the federal fluctuating work week methodology for women. (Petition, p. 2, 17-19, citing 29 Ops.Cal.Atty.Gen 57-20 (May 15, 1957).)
- The effect of the 1963 "Findings" of the Industrial Welfare Commission. (Petition, p. 19-20.)
- The "consistent application of *Skyline*'s analysis in

subsequent appellate decisions" (Petition, p. 28), including:

- *Alcala v. Western Ag Enterprises* (1986) 82 Cal.App.3d 546, 551. (Petition, p. 23.)
- *Hernandez v. Mendoza* (1988) 199 Cal.App.3d, 721 725. (Petition, p. 23-24.)
- *Ghory v. Al-Lahham* (1989) 299 Cal.App.3d 1487, 1491. (Petition, p. 24.)

- The effect of Section 48 of the DLSE Manual. (Petition, p. 29-30.)
- The effect of *Huntington Memorial v. Superior Court* (2007) 131 Cal.App.4th 893. (Petition, p. 30-32.)
- The effect of *Walling v. Hardwood Co.* (1945) 325 U.S. 419, 424. (Petition, p. 31.)
- The effect of *Reich v. Midwest Body Corp.* (N.D. Ill 1994) 843 F.Supp. 1249, 1251. (Petition, p. 32.)
- The effect of Title 29 of the Code of Federal Regulations, section 778.327. (Petition, p. 31.)
- The effect of Title 29 of the Code of Federal Regulations, section 778.500. (Petition, p. 32.)
- The effect of Title 29 of the Code of Federal Regulations, section 778.502. (Petition, p. 33-34.)
- The effect of Title 29 of the Code of Federal Regulations, section 778.203. (Petition, p. 34-35.)
- The effect of the fact that all Dart employees eligible for the attendance bonus earned less than $10.00 per hour, *a fact not in the record*, but which Alvarado necessarily assumes is true for Title 29 of the Code of Federal Regulations section 778.203 to be applicable. (Petition, p. 34-35.)

- The effect of Title 29 of the United States Code, section 207(e)(5). (Petition, p. 35.)

Regardless of the fact that not one of the cases that Alvarado now asks this Court to consider, nor any of the other authorities referenced by Alvarado are new, Alvarado failed to submit any reason whatsoever, much less any viable reason, as to why he never raised such cases and authorities, and arguments based thereon, in the Court of Appeal. Alvarado offers no explanation obviously because no good explanation exists. Rather, it appears that these are simply new issues that were raised by new counsel that Alvarado associated in at the eleventh hour, after the Court of Appeal issued its tentative opinion in favor of Dart and against Alvarado.

Alvarado's attempt to rewrite the factual and legal issues in this case, at well past the eleventh hour, in not appropriate and unacceptable. There is no reason for this Court to deviate from its normal policy of declining to consider an issue the Court of Appeal was not asked to consider. (Cal. Rules of Court, Rule 8.500(c)(1); see also *People v. McCullough* (2013) 56 Cal.4th 589, 591, n.1.) Dart therefore respectfully requests that the Court deny the Petition on the basis that it asks the Court to determine issues not raised with the Court of Appeal.

B. The Court Of Appeal's Statement Of The Issue And Facts Should Be Accepted

Alvarado's claim of four issues for review and repudiation of the previously undisputed fact that the attendance bonus is a bonus is an exercise in obfuscation. There is, and always has been, only one issue in this case, as unequivocally determined by the Court of Appeal: "This appeal raises the sole question of law of whether defendant's formula for calculating overtime on flat sum bonuses paid in the same pay period in which they are earned is lawful." (Opinion, p. 2.) Dart respectfully urges

this Court to follow its normal practice, per California Rules of Court, Rule 8.500(c)(2), of accepting the statement of issues and facts stated in the Opinion filed by the Court of Appeal, and reject Alvarado's statement of issues and facts.

Specifically, Alvarado seeks to expand the single straightforward issue originally identified by the parties and reiterated by the Court of Appeal to four new issues that use terms of art ("fixed amount component of a weekly wage"), incorporate new facts (the attendance bonus is a salary, not a bonus) and reference federal regulations (29 CFR 778.502 and 29 CFR 778.203) that had never been at issue previously. Thus, his Petition contends that this Court should consider:

> 1. Under California law, how must an employer calculate the 'regular rate' for the purpose of determining overtime pay when a weekly wage has an hourly component and a fixed amount component that is payable irrespective of whether or not overtime hours are worked?
>
> 2. Can an employer, under California law, divide a flat sum component of a weekly wage by total hours worked each week (apply 'fluctuating workweek' methodology) to arrive at the 'regular rate' for purposes of calculating overtime, where the number of hours varies from week to week, causing the overtime rate to decrease each week that the amount of overtime work increases?
>
> 3. Does California law require an employer to divide a flat sum component of a weekly wage by the maximum number of non-overtime hours for the week (e.g. 40 hours) in determining the 'regular rate' to be utilized in calculating overtime?
>
> 4. If California law is indeed silent on how to calculate overtime when flat sums called

> 'bonuses' are paid as part of a weekly wage, was the Court of Appeal's application of 29 CFR 788.209 (a) [sic] wrong, given the provisions of 29 CFR 778.502 and 29 CFR 778.203. (Petition, p. 1.)

Each issue asks the Court to depart from a focused inquiry based on the undisputed facts of this case and instead broadly determine imprecise issues that, even if resolved, do not answer the one specific question that was at issue in this litigation – whether Dart's formula for calculating overtime on flat sum bonuses paid in the same pay period in which they are earned is lawful.

Alvarado's briefs before the Court of Appeal are even inconsistent with his current version of the issues. In his Court of Appeal briefs, Alvarado framed the issue in the same manner as did the Court of Appeal: "[Alvarado] filed a wage and hour class action against his former employer [Dart] alleging [Dart's] formula for computing overtime compensation on flat sum bonuses paid to hourly employees for weekend work failed to comply with California law." (Opening Brief, p. 1.)

Moreover, prior to Alvarado's association of new counsel, the facts had always been undisputed. Alvarado's original counsel signed a Joint Statement of Undisputed Material Facts conceding and agreeing that Dart's attendance bonus was a bonus paid in the same pay period in which it was earned. (AA, p. 069-079.) Alvarado (as well as Dart, the Trial Court and the Court of Appeal) have all relied on the Joint Statement of Undisputed Material Facts throughout all proceedings. For the first time at oral argument before the Court of Appeal, Alvarado attempted to re-write the facts, claiming this case was not about bonuses at all, but rather about a "salary." As shown above, the Court of Appeal was unpersuaded by such untimely and contradictory argument.

California Rules of Court, Rule 8.500(c)(2) provides that "[a] party may petition for review without petitioning for rehearing in the Court of Appeal, but as a policy matter the Supreme Court normally will accept the Court of Appeal opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing." Here, Alvarado never petitioned the Court of Appeal for rehearing at all, much less on the basis that the Court of Appeal omitted or misstated an issue or fact. The Court of Appeal did not omit or misstate the issue or facts, nor could it have reasonably done so, since the Trial Court proceedings as well as the appeal were based on stipulated facts. There is no basis for this Court to tolerate Alvarado's attempt to now repudiate the facts which he agreed were undisputed or the sole issue he admitted was in dispute. Dart respectfully requests that the Court accept the statement of the issue and facts identified in the Opinion filed by the Court of Appeal in its entirety, and reject the issues and facts proffered in the Petition pursuant to California Rules of Court, Rule 8.500(c)(2).

C. There Is No Conflict Or Question Of Law Because There Is No Law On Point

Alvarado's entire Petition is premised on an alleged conflict of law that purportedly justifies this Court's intervention. But there can be no conflict of law when, as found by the Trial Court and the Court of Appeal, there is no California law on point.

Despite Alvarado's effort in his Petition (which is actually now his fourth attempt) to create law from policy statements from varying inapplicable sources, Alvarado has still not been able to point to a specific California law that identifies the formula that must be applied when a flat sum bonus is paid in the same pay period in which it is earned. That is

because no such law exists. As succinctly noted by the 2008 court of appeal decision in *Marin v. Costco Wholesale Corporation*, "no California court decision, statute, or regulation governs bonus overtime." (169 Cal.App.4th at 815.) Not one of the cases upon which Alvarado relies (at any time throughout this litigation) refute this proposition, and indeed none can, because *Marin* is the most recently decided case upon which Alvarado relies.

What Alvarado is really seeking, apparently, is legislation that codifies his home-made formula. Such, however, is not the role of the courts. The courts' function is to interpret the laws that already exist. This was aptly noted by the Court of Appeal, which noted: "...enacting the formula in the DLSE Manual section 49.2.4.2 as enforceable law falls within the domain of the Legislature and IWC, not with this court." (Opinion, p. 23.)

1. *Marin* Is Inapplicable To The Overtime Calculations At Issue Here

Alvarado's reliance on *Marin* as authority for his proposed formula is completely misplaced. (See Petition, p. 4, 5, 26, 27.) In *Marin*, a California court addressed the proper formula for deferred (i.e. a bonus not paid in the same pay period in which it is earned), semi-annual bonuses which were paid based on hours worked. (*Marin, supra*, 169 Cal.App.4th at 804.) To determine the bonus, the employer, Costco, first calculated a regular hourly bonus rate "by dividing the employee's maximum base bonus by the minimum paid hours required to achieve that maximum bonus (1,000)." Costco then determined overtime owed on the bonus by multiplying the number of overtime hours worked during the bonus period by the number of overtime hours worked, and then multiplying that sum by 0.5. (*Id.* at 808.) The plaintiff advocated for a formula that determined the

regular bonus rate by dividing the employee's base bonus earned by the number of straight time hours worked. The plaintiff then argued the regular bonus rate should be multiplied by the total number of overtime hours worked and then by a 1.5 multiplier. (*Id.*)

The court focused on the appropriate multiplier to be used in calculating the bonus: 0.5 or 1.5. The court initially found that "no California court decision, statute, or regulation governs bonus overtime, the Manual sections on the subject do not have the force of law, and the DLSE opinion letters on the subject are not on point. Thus, there is no controlling authority apart from the directive that overtime hours be compensated at a rate of no less than one and one-half times the regular rate of pay." (*Id.* at 815.) In other words, there is no California law on point.

With that blank slate, the court was free to determine whether Costco's formula was lawful. In finding the formula lawful, it borrowed from the DLSE Manual, stating that "we are persuaded that the Manual provisions for overtime on production bonuses set forth a valid formula." (*Id.* at 816.) The court characterized the deferred Costco bonus as a deferred "production bonus" and borrowed the DLSE's use of a 0.5 multiplier for production bonuses; it did not find (nor could it given the question presented) that the appropriate multiplier for an attendance bonus unrelated to production is 1.5. Nor did the court give any instructions on how to calculate overtime on an attendance bonus paid in the same pay period during which it was earned instead of being deferred. The *Marin* court finally found that there were no federal regulations "directly on point" (which is of course contrary to the situation here, where the federal regulations speak precisely to the instant situation and mandate Dart's formula). (*Id.* at 820.) Thus, *Marin* applies only to deferred bonuses based on an employee's production where no federal law applies. It has no bearing on an attendance bonus paid during the same period in which it is

earned where federal law is precisely on point.

That being said, to the extent *Marin* applies at all, it endorses the use of a 0.5 multiplier to determine the amount of overtime to be paid on a bonus, not the 1.5 multiplier for which Alvarado advocates. In fact, the *Marin* court buttressed its conclusion by referring to the fact that while federal regulations in that case were not directly on point, federal law "is generally supportive of defendant's formula insofar as it contemplates an overtime-hour multiplier of 0.5, rather than 1.5, to compute the bonus overtime." (*Marin, supra*, 169 Cal.App.4th at 820.) Dart's formula uses the 0.5 multiplier that federal law requires.

2. *Skyline* Is Not Controlling

Alvarado substantially relies on *Skyline* in his Petition for the purported public policy that a bonus formula should not decrease the employee's regular rate of pay as the employee works more overtime hours. Such reliance is misplaced because there is no legal authority for the underlying public policy. Moreover, public policy dictates that Dart should not be liable for, in the absence of any controlling California law, following the formula outlined in federal law. Furthermore, decided 23 years before *Marin*, *Skyline* is neither controlling nor does it contradict the legal authorities upon which Dart relies in its overtime calculations.

a. *Skyline*'s Purported Legislative Intent Does Not And Cannot Support The Bonus Formula Alvarado Uses

Alvarado's Petition is based on a slippery slope, in that he relies on the *Skyline* court's assumption of what the intent behind the wage orders must have been:

> Unless the insertion of the limitation with respect to the eight-hour day is to be rendered meaningless, we must **assume** that the IWC intended to impose a different standard for determining overtime than allowed under the FLSA. **If**, as seems obvious, the IWC intended to employ an eight-hour day standard and to discourage the use of longer work days, the fluctuating workweek would not effectuate this purpose. (*Skyline*, *supra*, 165 Cal.App.3d at 248, *emphasis added.*) (See Opening Brief, p. 15.)

Skyline's assumption of legislative intent, without a citation to or summary of actual legislative intent, or a specific discussion regarding the calculation of overtime on a bonus, is a nonstarter. Furthermore, neither *Industrial Welfare Commission v. Superior Court of Kern County* (1980) 27 Cal.3d 690, 713 nor *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1109, both of which Alvarado relies upon, do not include any discussion of the legislative intent regarding the calculation of overtime on a bonus. Those cases, and *Skyline*, at best stand for the proposition that overtime should be paid when employees work more than eight hours in a workday and that overtime is viewed as a penalty. However, it is undisputed that Dart pays overtime to its employees who work more than eight hours a day or forty hours in a workweek. Furthermore, these cases ignore the fact that the wage orders themselves contain exceptions to the rule that overtime be paid for work in excess of eight hours for such positions as nurses. (See 8 C.C.R., § 11040(3)(B).) Simply, the purported legislative intent Alvarado relies on is irrelevant.

In reality, Alvarado's bonus formula relies on purported public policy, not legislative intent, for the peculiar rule on "flat sum" bonuses, namely that a bonus formula should not decrease the employee's regular rate of pay as the employee works more overtime hours. In fact, *Marin*

noted that the DLSE formula for flat sum bonuses "produces 'a premium based on bonus' that the **DLSE believes** it is necessary to avoid encouraging the use of overtime." (*Marin, supra*, 169 Cal.App.4th at 818, *emphasis added.*) However, the DLSE is not authorized to base a rule on public policy where, as here, there is no constitutional or statutory or regulatory provision to which the purported public policy is tied.

In fact, courts do not have the authority to implicitly enact prohibitions that the legislature has failed to enact explicitly. For example, in *Carter v. Escondido Union High Sch. Dist.* (2007) 148 Cal.App.4th 922, 925, the court held that for an employer to be liable for wrongful termination of public policy, the employer's conduct must violate a policy that is "fundamental," "well-established," and "carefully tethered" to a constitutional or statutory provision. The court held that the public policy upon which liability was premised, characterized as "the policy against teachers recommending weight-gaining substances to students," failed to satisfy these requirements. The court explained that although there may be sound policy reasons to bar such a practice, there is no law that does so, and "any such prohibition must be enacted explicitly by the Legislature, not implicitly by the courts." The court therefore concluded that as the practice was neither prohibited by law nor in contravention of well-established public policy, there was no basis for liability. (*Id.* at 925-926; see also *Gantt v. Sentry Ins.* (1992) 1 Cal.4th 1083, 1095 ("A public policy exception carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions strikes the proper balance among the interests of employers, employees and the public.")

While California law mandates that employees are entitled to "no less than one and one-half times the regular rate of pay" for work in excess of eight hours in one workday (Lab. Code, § 510(a); 8 C.C.R., § 11070), there is no California constitutional, statutory or regulatory provision

outlining any particular method for paying bonus overtime. (*Marin, supra*, 169 Cal.App.4th at 815-816.) Furthermore, the general overtime provisions in the Labor Code and Code of Regulations in no way support Alvarado's "rules" on bonus overtime. There is clearly a void in the law, and Alvarado advocates filling in that void with a self-serving policy that has no basis in any legislative enactment or constitutional provision. Alvarado fails to understand that where California law is silent, the courts, and by extension non-rulemaking administrative agencies such as the DLSE, are not empowered to declare public policy. (See *Jennings v. Marralle* (1994) 8 Cal.4th 121, 134-36 [even though a public policy against age discrimination appears in various former statutes and in the Fair Employment and Housing Act, there still could be no common-law claim for wrongful discharge of an employee in violation of a public policy based on age discrimination, where the employer, employing fewer than five employees, was expressly exempted from the FEHA's ban on age discrimination].)

b. *Skyline* Is Neither Controlling Nor Applicable

Alvarado further errs in relying on *Skyline* because it is neither controlling nor applicable. *Skyline*'s analysis was confined to salaried employees and the specific problem of calculating a regular rate of pay when such employees work overtime and variable hours (i.e., a fluctuating workweek). (*Skyline*, 165 Cal.App.3d at 244.) Additionally, *Skyline* did not address bonuses in any respect. *Skyline* dealt with an employer that failed to pay overtime to employees who worked more than eight hours a day, which is not the case here. Accordingly, *Skyline* is neither applicable nor controlling.[3]

Skyline does not identify any California court decision, statute or

[3] The *Marin* court found *Skyline* inapplicable for similar reasons. (*Marin, supra*, 169 Cal.App.4th at 811.)

regulation that establishes that Dart's formula for calculating bonuses is unlawful. Indeed, the case did not mention, much less analyze, overtime due on bonuses. Nor did the *Skyline* court dispute that in the absence of California law or regulation to the contrary, federal law should be followed. (See *Skyline*, *supra*, 165 Cal.App.3d at 246-247.) Regardless, Dart's formula does not conflict with the basic principle of *Skyline*, namely that California employees are entitled to overtime for work in excess of eight hours in a day and forty hours in a week.

3. Attorney General Opinions Do Not Have The Force Of Law And Are Irrelevant To This Case

Alvarado's reliance on a 1957 Attorney General opinion is a non-starter. This Court has plainly stated that Attorney General opinions are not of controlling authority and have no precedential value. (*People v. Shearer* (1866) 30 Cal. 645, 652-653; see also *Thorning v. Hollister School Dis.* (1992) 11 Cal.App.4th 1598, 1604.) The opinion is also ultimately irrelevant, as the Labor Code includes a provision directly on point which mandates that employees are entitled to "no less than one and one-half times the regular rate of pay" for work in excess of eight hours in one workday. (Lab. Code, § 510(a); see also 8 C.C.R., § 11070.)[4]

That being said, Dart's formula does not conflict with the gravamen of the 1957 opinion, namely that California employees are entitled to overtime for work in excess of eight hours in a day and forty hours in a week.

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[4] Furthermore, the Petition ignores the fact that the wage orders themselves contain exceptions to the rule that overtime be paid for work in excess of 8 hours for such positions as nurses. (See, e.g., 8 C.C.R., § 11040(3)(B).)

4. IWC Findings Do Not Have The Force Of Law And Are Irrelevant To This Case

Alvarado finally relies upon what he refers to as "Findings" of the IWC. (Petition, p. 19-20.) In reality, he is a referring to a footnote in the DLSE Enforcement Manual, page 48-2, which provision does not have the force of law. (See DLSE Manual section 1.1.6.1 [states that if the source of the interpretation is a statute, regulation, court decision, opinion letter, or "Administrative Decision" or "Precedent Decision" of the Labor Commissioner, that source will be identified in the Manual. No such sources are mentioned in the quoted paragraph. The only source cited is the Commission's intent.]; see also *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568- 577.)

Nor does Alvarado provide any citation to the 1963 "Findings" of the IWC archives upon which he directly relies (even though he did not attach a copy of the "Findings" to the Petition). Since these "Findings" have not been codified in the California Code of Federal Regulations, as are the Wage Orders, the "Findings" do not have the force of law and cannot be considered controlling California precedent.

Regardless, the "Findings" are irrelevant. They state, in part: "It was the Commission's intent that in establishing the regular rate of pay for *salaried* employees the *weekly* remuneration is divided by the agreed or usual hours of work exclusive of daily hours over eight." (Petition, p. 19-20 [*emph. added*].) As Alvarado was not a salaried employees, but rather was hourly, even if the IWC's findings were controlling (which they are not), they don't apply here.

IV.

CONCLUSION

For the above stated reasons, Dart respectfully requests that this Court deny Alvarado's Petition for Review.

Dated: March 14, 2016

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(CALIFORNIA RULES OF COURT, RULE 8.204(c)(1))

The undersigned counsel certifies the text of this brief, including all footnotes, consists of 7,285 words as counted by the Microsoft Word word-processing program used to generate this brief.

Dated: March 14, 2016

Respectfully submitted,

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PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is 3390 University Avenue, 5th Floor, P.O. Box 1028, Riverside, California 92502. On March 14, 2016, I served the following document(s):

RESPONDENT'S ANSWER TO PETITIONER'S PETITION FOR REVIEW

☐ **By fax transmission.** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

☐ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed below (specify one):

- ☐ Deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.
- ☐ Placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Riverside, California.

☐ **By personal service.** At ____ a.m./p.m., I personally delivered the documents to the persons at the addresses listed below. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an Individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening.

☐ **By messenger service.** I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed below and providing them to a professional messenger service for service. A Declaration of Messenger is attached.

☒ **By overnight delivery.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☐ **By e-mail or electronic transmission.** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

PLEASE SEE THE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 14, 2016, at Riverside, California.

Lisa Ruiz-Cambio

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